Fusing Construction Sdn Bhd v Eon Finance Bhd (formerly known as Kong Ming Finance Corp Bhd)

HIGH COURT (TAWAU) — ORIGINATING SUMMONS NO T(24)-35 OF 1994
IAN CHIN J
15 MARCH 1995

Civil Procedure *— Parties — Joinder of parties — Application to add defendants — Whether intended defendants directly affected by suit — Whether defendants' counterclaim time-barred — Whether there was arguable issue in counterclaim — Limitation Ordinance (Cap 72) (Sabah) s 9*

This was an application by one Sia Kie Sung ('Sia') and Eon Bank Bhd ('Eon Bank'), to intervene as defendants in the present action and be allowed to counterclaim for ownership of the land and shophouse erected on Tawau Town Lease No 107522261 ('the property'). The plaintiff had commenced the action claiming a declaration that it is the registered and absolute beneficial owner of the property, arrears of rental totalling RM336,000, double rental from 1 January 1994 until delivery of vacant possession and interest from the defendant. The plaintiff alleged that it had paid RM455,000 for the property for which it became the registered owner on 27 March 1984. The property was, by a lease agreement dated 27 December 1983, rented to the defendant for ten years at a monthly rent of RM6,000.

The defendant, however, claimed that there had been an oral agreement between the plaintiff and Eon Bank, which had paid the full purchase price of the property, that the property be purchased and registered in the plaintiff's name but that the plaintiff should charge the property to the defendant to raise the loan to reimburse Eon Bank. The defendant also claimed it was occupying the property rent-free with the permission of Eon Bank and that Eon Bank had been acknowledged by the plaintiff to be the rightful owner of the property during a meeting with Bank Negara officials on 19 January 1989. Sia and Eon Bank claimed that the plaintiff held the property in trust for them or either of them. The plaintiff submitted that the application for intervention ought to be dismissed because: (i) the claim was based on an oral agreement which was time-barred; (ii) the claim was based on an oral trust which was bad in law because a trust of immovable property must be in writing as required by the English Statute of Frauds 1677; and (iii) there was no adequate evidence to support the contention of the existence of a trust.

Held, allowing the application:

(1) The test to be applied when considering whether to allow an application of interveners to be joined as defendants is whether

their rights or liabilities would be directly affected by the granting of a declaration in favour of the plaintiff. In this case, it was clear that Sia's and Eon Bank's rights in respect of the property would be directly affected as the subject matter of the action was the ownership of the property, and if they did not apply to be added as parties, they could be forever barred as they knew of the proceedings the outcome of which would affect their rights.

(2) Whether or not Sia's and Eon Bank's claim was statute-barred was an arguable issue in the light of s 9 of the Limitation Ordinance (Cap 72) (Sabah). Furthermore, The law relating to whether or not a trust of immovable property had to be in writing and the applicability of the English Statute of Frauds 1677 was far from settled.

(4) Sia and Eon Bank had adduced sufficient documentary evidence to establish an arguable issue as to whether the money for the purchase of the property came from them or from the plaintiff. Therefore, it could not be said that there was no substance in their claim and they were accordingly joined as defendants.

[Bahasa Malaysia summary

Ini adalah suatu permohonan oleh seorang bernama Sia Kie Sung ('Sia') dan Eon Bank Bhd ('Eon Bank') untuk mencelah sebagai defendan dalam tindakan guaman ini dan untuk dibenarkan membuat tuntutan balas bagi pemunyaan tanah dan rumah kedai yang didirikan atas Pajakan Pekan Tawau No 107522261 ('tanah itu'). Plaintif telah memulakan tindakan guaman ini untuk menuntut suatu deklarasi bahawa ia adalah pemunya berdaftar dan pemunya benefisial mutlak tanah itu, tunggakan sewa berjumlah RM336,000, sewa sekali ganda dari 1 Januari 1994 sehingga penghantar-serahan milikan kosong dan bunga daripada defendan. Plaintif mengatakan bahawa ia telah membayar RM455,000 untuk harta itu untuk mana ia menjadi pemunya berdaftar pada 27 Mac 1984. Tanah itu, melalui suatu perjanjian pajakan bertarikh 27 Disember 1983, telah disewa kepada defendan selama sepuluh tahun pada sewa bulanan RM6,000.

Defendan, walau bagaimanapun, menyatakan bahawa terdapat suatu perjanjian lisan di antara plaintif dan Eon Bank, yang telah membayar harga belian harta itu sepenuhnya, supaya tanah itu dibeli dan didaftar atas nama plaintif tetapi plaintif harus menggadai tanah itu kepada defendan supaya mendapatkan pinjaman untuk membayar balik Eon Bank. Defendan juga menyatakan bahawa ia menduduki tanah itu tanpa sewa dengan kebenaran Eon Bank dan bahawa Eon Bank telah diiktiraf oleh plaintif sebagai pemunya tanah itu yang sah pada suatu mesyuarat dengan pegawai-pegawai Bank Negara pada 19 Januari 1989. Sia dan Eon Bank mengatakan bahawa plaintif memegang tanah itu atas amanah untuk mereka atau salah seorang daripada mereka. Plaintif berhujah bahawa permohonan untuk mencelah itu harus ditolak kerana: (i) tuntutan itu adalah berdasarkan

pada suatu perjanjian lisan yang dihalang oleh had masa; (ii) tuntutan itu adalah berdasarkan suatu amanah lisan yang buruk di sisi undang-undang kerana sesuatu amanah harta tak alih mesti dibuat secara bertulis mengikut Statute of Frauds 1677 England; dan (iii) tidak terdapat bukti yang mencukupi untuk menyokong penegasan bahawa wujudnya suatu amanah.

Diputuskan, membenarkan permohonan itu:

(1) Ujian yang dipakai apabila mempertimbangkan sama ada suatu permohonan pencelah supaya dicantumkan sebagai defendan harus dibenarkan ialah sama ada hak atau liabiliti mereka akan terjejas secara langsung oleh pemberian deklarasi yang memihak kepada plaintif. Di dalam kes ini, adalah jelas bahawa hak Sia dan Eon Bank akan terjejas secara langsung kerana isi perkara tindakan ini adalah pemunyaan tanah itu dan jika mereka tidak mohon untuk dicantumkan sebagai pihak, mereka mungkin akan dihalang selama-lamanya kerana mereka tahu tentang prosiding itu yang mana keputusannya akan menjejaskan hak mereka.

(2) Sama ada tuntutan Sia dan Eon Bank itu dihalang oleh had masa atau tidak adalah suatu isu yang boleh dipertikaikan memandangkan s 9 Limitation Ordinance (Cap 72) (Sabah). Lebih-lebih lagi, undang-undang berkenaan dengan sama ada sesuatu amanah harta tak alih mestilah dalam bentuk bertulis dan terpakainya Statute of Frauds 1677 masih belum mantap.

(4) Sia dan Eon Bank telah mengemukakan keterangan dokumentar yang mencukupi untuk menunjukkan suatu isu yang boleh dipertikaikan mengenai sama ada wang untuk pembelian tanah itu datangnya daripada Sia atau Eon Bank atau daripada plaintif. Oleh itu, ia tidak boleh dikatakan bahawa tuntutan pencelah itu tidak berisi dan, dengan demikian, mereka dicantumkan sebagai defendan.]

Notes

For cases on the joinder of parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2415–2433.

Cases referred to

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd)

Hee Awa & Ors v Syed Muhammad Sazalay & Anor [1988] 1 MLJ 300 (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)

Yamamori (Hongkong) Ltd v Davidson & Ors [1992] 2 MLJ 410 (refd)

Legislation referred to

Limitation Ordinance (Cap 72) (Sabah) s 9
Statute of Frauds 1677 [Eng]

Simon Shim (*Shim, Pang & Co*) for the plaintiff.
Ting E Hang (*Ting & Co*) for the defendants.
Paul Kan (*Paul Kan & Co*) for the interveners.

Cur Adv Vult

Ian Chin J: This is an application by Sia Kie Sung ('Sia') and Eon Bank Bhd ('Eon Bank') to be added as defendants in the action herein. Fusing Construction Sdn Bhd ('the plaintiff') had taken out the present originating summons against Eon Finance Bhd, formerly known as Kong Ming Finance ('Eon Finance'), claiming a declaration that they are the registered and absolute beneficial owners of the land and shophouse erected on Tawau Town Lease No 107522261 ('the property'). The originating summons was heard on 14 October 1994 and I ordered pleadings to be delivered and I also gave directions for the trial of this action with the trial scheduled for six days commencing on 13 March 1995.

The plaintiff, by their statement of claim, allege that they have paid RM455,000 for property for which they became the registered owner on 27 March 1984. The property was, by a lease agreement dated 27 December 1983, rented by the plaintiff to Eon Finance for ten years at a monthly rent of RM6,000. A sum of RM354,000 had been paid as rental. But it was also alleged in the statement of claim that the plaintiff and Eon Finance had, on 6 November 1991, agreed in writing to submit the ownership claim to the property to Bank Negara and the plaintiff had pursuant thereto submitted their claim to Bank Negara on 8 May 1992 but Bank Negara had yet to make a decision and hence this action by which they claim a declaration that they are the registered and absolute beneficial owner of the property, arrears of rental totalling RM336,000, double rental from 1 January 1994 until delivery of vacant possession and interest.

Eon Finance, in their defence, allege that it was Eon Bank that wanted to purchase the property to carry out its banking business in Tawau and had approached one Sia Kie Sung, one of the intended interveners, to look for the property. It was, the defence continues, orally agreed between the plaintiff and Eon Bank that the property be 'purchased and registered in the plaintiff's name but that the plaintiff should charge the property to Eon Finance to raise the loan to reimburse Eon Bank. The property would also be leased to Eon Finance for ten years at a rental which was sufficient to cover the monthly repayment of the proposed loan. It is also alleged that Eon Finance would have an option to purchase the property from the plaintiff 'at a price the plaintiff would make a profit'. The full purchase price of the property was paid by Eon Bank. It was

against the backdrop of this oral agreement that the plaintiff came to purchase and be registered as the owner of the property and that the plaintiff holds the property on a resulting trust for Eon Bank, Eon Finance alleges. As for the payments of the rental, Eon Finance maintained that they were paid under duress and threat of eviction and to prevent a run on Eon Finance and Eon Bank. It was also alleged that Eon Finance is occupying the property rent-free by the permission of Eon Bank and that Eon Bank was acknowledged by the plaintiff to be the rightful owner of the property during a meeting with Bank Negara officials on 19 January 1989. A reply was delivered but I do not think it is necessary to advert to it.

It was against this background that on 27 February 1995, just two weeks before the trial was scheduled to commence, Sia and Eon Bank took out the present application to intervene as defendants and be allowed to counterclaim for ownership of the property. They claim that the plaintiff holds the property in trust for them or either of them. Sia, in his affidavit, related how he made payment for the purchase of the property and the related expenses after Eon Bank had asked him to do so and after Eon Bank had remitted to him the necessary funds. Things did not go according to the oral arrangement adverted to by Eon Finance due to disputes between the plaintiff and some shareholders of Eon Bank resulting in many suits being launched. Sia also launched his suit in 1984 against the plaintiff regarding the property but it was discontinued, after the agreement of 6 November 1991 to refer the matter to Bank Negara. As for Eon Bank, its regional manager, Lau Gah Liew, deposed an affidavit and elaborated on Eon Bank's decision to buy the property. Two gentlemen named Abang Hj Mohammed bin Abang Sarkawi and Ling Kuong Hua were the then directors of the plaintiff and had represented the plaintiff when the plaintiff orally agreed that the property was to be registered in the plaintiff's name, that Eon Bank was to furnish the money to Sia to make the purchase and which property was thereafter to be charged as mentioned earlier. There were other similar arrangements in respect of other properties elsewhere and the oral arrangement were carried through. Eon Bank also confirmed the written agreement of 6 November 1991 to refer the ownership claim to Bank Negara. The relevant provision of this agreement reads:

> 2(a) In relation to the Limbang property and the Tawau property, Fusing and KMB has agreed that the ownership thereto shall be determined by Bank Negara and the parties hereby expressly agree to abide by the decision of Bank Negara and act accordingly in terms of the decision.
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> (b) In pursuant (sic) to cl 2(a) above KMB and Fusing shall, within fourteen (14) days from the completion of the acquisition agreement, submit to Bank Negara all relevant documentary evidence to substantiate their respective claims for ownership thereto provided always that prior to submission to Bank Negara, the parties hereto will consult Bank Negara in relation to the terms of reference for the determination of rentals and ownership of the Limbang property and the Tawau property and obtain Bank Negara's acceptance to the terms of reference.
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> (c) In the event that Bank Negara determines the ownership of the Limbang property and the Tawau property in favour of Fusing, then KMB shall

forthwith pay to Fusing all arrears of rentals for the Limbang property and the Tawau property.

(d) In the event that Bank Negara determines the ownership of the Limbang property and the Tawau property in favour of KMB, then Fusing shall forthwith refund to KMB the sum of Ringgit Seven Hundred and Fifty Five Thousand (RM755,000) only being rentals paid for the Limbang property and the Tawau property.

In the just quoted clause, 'Tawau property' refers to the property, 'KMB' refers to Eon Bank while 'Fusing' refers to the plaintiff.

It was upon the history and facts of this case that I have just summarized that Mr Simon Shim, counsel for the plaintiff, submitted that the application for intervention ought to be dismissed because: (1) the interveners' claim is based on an oral agreement which was barred three years after the right to sue had commenced; and (2) the interveners' claim is based on an oral trust which is bad in law because a trust of immovable property must be in writing as required by the English Statute of Frauds 1677. There were two other grounds and they were based principally on the inadequacy of evidence to support the contention of the existence of a trust. Mr Ting E Hang, counsel for Eon Finance, and Mr Paul Kan, counsel for Sia and Eon Bank, argued otherwise.

In summary, the plaintiff is claiming the property against Eon Finance while Eon Finance, though not claiming ownership, contends that the property belongs to Eon Bank from whom Eon Finance had obtained permission to remain in the property. Sia and Eon Bank are claiming the property to be theirs. Therefore, the subjectmatter of this action is the ownership of the property. It should be clear to all that the rights or liabilities of Sia and Eon Bank to the plaintiff in respect of the property will be directly affected by the granting of a declaration in favour of the plaintiff which 'direct affection' is the test to be applied in this case when considering whether to allow the application of Sia and Eon Bank to be joined as defendants. See *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300; *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52; *Yamamori (Hongkong) Ltd v Davidson & Ors* [1992] 2 MLJ 410. Aside from that, Sia and Eon Bank would earn the stricture that was handed down to parties who knew of proceedings the outcome of which would affect their right and yet did nothing to apply to be joined as defendants. See *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 at pp 724–725. Sia and Eon Bank may be forever barred if they do not apply to join as defendants to contest the plaintiff's claim to ownership of the property.

As for the issue of the trust not being in writing and the applicability of the Statute of Frauds 1677, Mr Simon Shim himself had to concede that the law is far from settled and this came after I had questioned him whether there are other authorities on this point other than those in the list he submitted to the court and learned counsel thereafter referred additionally to *Cheshire, Fifoot and Furmston's Law of Contract*, Singapore and Malaysian Edition (1994) at p 346 and footnote 147.

Mr Paul Kan referred the court to s 9 of the Limitation Ordinance (Cap 72) (Sabah) and submitted that the proposed interveners' claim is not statute-barred. The section says:

> Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property, shall be barred by any length of time.

That was submitted in answer to the argument that the claim was statute-barred since the action was not commenced within three years. The section, supra, at least makes the point an arguable issue.

The other grounds for opposing the joinder were, as mentioned earlier, related to the question of fact. It suffices for me to state here that Sia and Eon Bank had adduced sufficient documentary evidence to at least establish an arguable issue as to whether the money for the purchase of the property came from Sia or Eon Bank or from the plaintiff. In this regard, the plaintiff relied on a receipt issued to their name by the vendor but Sia and Eon Bank referred to a bank draft which the said receipt allegedly refers to and which bank draft was allegedly bought with the money from the account of Sia and which money Eon Bank had remitted to Sia. Again, it cannot be said that there is no substance in the claim of Sia and Eon Bank.

I therefore allow Sia and Eon Bank's application to be joined, respectively, as second and third defendant and they shall within 14 days hereof file their respective defence and counterclaim to the statement of claim of the plaintiff. The plaintiff shall have seven days after the service on them of the defence and counterclaim to deliver a reply and defence to the counterclaim. Sia and Eon Bank shall thereafter have seven days to reply. The plaintiff shall within 30 days thereafter take out a summons for directions for the trial of this case which has been postponed to 18 September 1995. Sia and Eon Bank should have applied much earlier to join as defendants but they did not and this has resulted in the postponement of the trial of this action. I will consider the question of costs after the trial of this action.

Application allowed.

Reported by Sarojah Arianayagam